

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-17-239-D
	)	
JERRY DRAKE VARNELL,	)	
	)	
Defendant.	)	

**MOTION FOR LEAVE TO FILE OUT OF TIME DEFENDANT'S MOTION TO  
DISMISS COUNTS IN THE INDICTMENT OR IN THE ALTERNATIVE  
MOTION TO HAVE THE UNITED STATES ELECT TO PROSECUTE  
DEFENDANT ON EITHER COUNT ONE OR COUNT TWO, DUE TO  
MULTIPLICITY OF COUNTS**

The defendant, Jerry Drake Varnell, through his attorneys of record, Marna Franklin and Vicki Zemp Behenna, moves this court for leave to file out of time his motion to dismiss counts in the Indictment. Counsel, in preparing the jury instructions, observed that the essential elements of Count 1 – Attempted Use of an Explosive Devise in violation of 18 U.S.C. §844(i), are the same as the essential elements of Count 2 - Attempted use of a Weapon of Mass Destruction. Because the defendant faces the possibility of being punished twice for the same offense, the defendant request leave to file the motion to dismiss counts in the Indictment or, alternatively, motion to require the United States to elect either Count 1 or Count 2 to prosecute defendant, out of time. In support of his motion, the defendant submits the following:

1. A complaint was filed against the defendant on August 13, 2017, alleging a violation of 18 U.S.C. § 844(i). (Doc. 1.)

2. The grand jury returned a one Count Indictment against the defendant on October 17, 2017 charging a violation of 18 U.S.C. §844(i). (Doc. 56.)

3. On April 17, 2018, before the May trial date, the grand jury returned a Superseding Indictment against the defendant. (Doc. 121.)

4. The Superseding Indictment added Count 2, which alleged a violation of 18 U.S.C. §2332a, attempt to use a weapon of mass destruction.

5. The trial was rescheduled for July 2018 and pretrial motions were due on or before April 30, 2018. Pretrial motions related to Count 2 were due on or before May 14, 2018. (Doc. 130.)

6. On June 27, 2018, the trial was again continued from the July trial docket and rescheduled for the November 2018 docket. (Doc. 157.) All deadlines and hearings were terminated.

7. Due to discovery issues and the case's reassignment, the trial was again rescheduled for the February 2019 trial docket.

8. Deadlines for filing pretrial motions relating to Count 2 were to be filed on or before May 14, 2018, and that deadline was never extended or reset.

WHEREFORE, counsel for the defendant requests leave to file out of time his motion to dismiss counts in the Indictment or, in the alternative, to require the United States

to elect either Count 1 or Count 2 to proceed to trial against the defendant, because the counts as alleged in the Indictment are multiplicitous.

Respectfully submitted,

/s/ Vicki Zemp Behenna  
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*Attorney for Defendant,  
Jerry Drake Varnell*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of January, 2019, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of Notice of Electronic Filing, which will automatically send e-mail notification of such filing to all attorneys of record.

/s/ Vicki Zemp Behenna  
Vicki Zemp Behenna